(1)

89-1905

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

WISCONSIN PUBLIC INTERVENOR, and TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER and
WISCONSIN FORESTRY/RIGHTS-OF-WAY/
TURF COALITION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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QUESTIONS PRESENTED

1. Under the Supremacy Clause of the United States Constitution, is the authority of local units of government to enact ordinances in the exercise of their police powers to protect their citizens and environments from hazards of chemical pesticides pre-empted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1980)?

2. Where the Congress in FIFRA expressly allows states to regulate pesticides, may FIFRA, consistent with fundamental principles of federalism embodied in the Tenth Amendment to the United States Constitution, be interpreted to deprive states of their authority to delegate to local governments the task of regulating pesticides for protecting the health, safety, and welfare of their citizens?

LIST OF PARTIES

The parties to these proceedings are the same as those to the proceedings below. The petitioners (original defendants) are the State of Wisconsin Public Intervenor and Town of Casey, Wisconsin, Imbert M. Eslinger, Louis N. Place, Roland K. Colby. The respondents (original plaintiffs) are Ralph Mortier and Wisconsin Forestry/Rights-of-Way/Turf Coalition.

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The decision of the Wisconsin Supreme Court in this case is reported as Mortier v. Town of Casey, 154 Wis. 2d 18, 452 N.W.2d 555 (1990) (I App. A).

The decision of the Washburn County, Wisconsin Circuit Court in Ralph Mortier, et al. v. Town of Casey, et al., is in 1) the PARTIAL TRANSCRIPT -- FINDINGS BY THE COURT MOTION HEARING, and 2) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, Case No. 86-CV-134 (Filed June 16, 1988) (II App. B).

JURISDICTION

The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a) (Supp. 1990).

Here a final judgment was entered by the Wisconsin Supreme Court, the highest court in the State of Wisconsin, by opinion filed March 12, 1990, on the above-captioned matter. That judgment voided a local ordinance on the ground that that ordinance

was pre-empted by federal law (FIFRA), and therefore was repugnant to the Supremacy Clause of the United States Constitution.

> The controlling question here arises under art. VI, clause 2, of the United States Constitution, the Supremacy Clause, which provided that all laws of the United States made pursuant to the Constitution are "the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding."

Mortier v. Town of Casey, 154 Wis. 2d 18, 21, 452 N.W.2d 555, 556 (1990). The United States Supreme Court may grant this petition for writ of certiorari under 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a state . . . may be reviewed by the Supreme Court by writ of certiorari where . . . the validity of a statute of any State is drawn into question on the ground that it is repugnant to the Constitution, . . . or laws of the United States . . . .

A local ordinance is deemed a state statute for purposes of invoking the jurisdiction of the United States Supreme

Court. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985). The Court may review the validity of a local ordinance which was assailed as unconstitutional by final judgment or decree of the highest state court in which a decision could be had. Id.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitutional Provisions

Article VI, Clause 2 Supremacy Clause

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The Tenth Amendment

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutory Provisions
Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),
7 U.S.C. §§ 136(aa), 136v, 136t(b) (1980).

7 U.S.C. § 136(aa):

State.--The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

7 U.S.C. § 136v:

Authority of States

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

(c)(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied,

disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State.

(2) A registration issued by a State under this subsection shall not be effective for more than ninety days if disapproved by the Administrator within that period. Prior to disapproval, the Administrator shall, except as provided in paragraph (3) of this subsection, advise the State of the Administrator's intention to disapprove and the reasons therefor, and provide the State time to respond. The Administrator shall not prohibit or disapprove a registration issued by a State under this subsection (A) on the basis of lack of essentiality of a pesticide or (B) except as provided in paragraph (3) of this subsection, if its composition and use patterns are similar to those of a federally registered pesticide.

(3) In no instance may a State issue a registration for a food or feed use unless there exists a tolerance or exemption under the Federal Food, Drug, and Cosmetic Act that permits the residues of the pesticide on the food or feed. If the Administrator determines that a registration issued by a State is

inconsistent with the Federal Food, Drug, and Cosmetic Act, or the use of, a pesticide under a registration issued by a State constitutes an imminent hazard, the Administrator may immediately disapprove the registration.

(4) If the Administrator finds, in accordance with standards set forth in regulations issued under section 136w of this title, that a State is not capable of exercising adequate controls to assure that State registration under this section will be in accord with the purposes of this subchapter or has failed to exercise adequate controls, the Administrator may suspend the authority of the State to register pesticides until such time as the Administrator is satisfied that the State can and will exercise adequate controls. Prior to any such suspension, the Administrator shall advise the State of the Administrator's intention to suspend and the reasons therefor and provide the State time to respond.

7 U.S.C. § 136t(b):

(b) Cooperation.--The Administrator shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of

this subchapter, and in securing uniformity of regulations.

Ordinances

Town of Casey, Washburn County, Wisconsin Ordinance No. 85-1 (1985) (II App. C).

STATEMENT OF THE CASE

This petition for writ of certiorari to the Wisconsin Supreme Court is based on that court's affirmance of a Washburn County, Wisconsin, Circuit (trial) Court decision and order (II App. B) declaring Town of Casey, Washburn County, Wisconsin, Ordinance 85-1 (II App. C), "void, invalid and of no effect."

The ordinance requires a permit from the town prior to application of pesticides to public lands, private lands subject to public use, and to aerial application of pesticides in the town. Ord. § 1.2. Under the ordinance, permit decisions are to be made after applicants submit adequate information upon which intelligent decisions

can be made. Ord. § 1.3. Hearing rights are provided. Ord. § 1.3(4) and (5). A nominal application fee is required. Ord. § 1.3(6). And public notice of pesticide applications through placarding is required. Ord. § 1.3(7). Each violation of the ordinance carries "a forfeiture of up to $5,000.00." Ord. § 2.

Plaintiffs-respondents (hereafter plaintiffs) challenged the validity of the ordinance in the Washburn County Circuit Court, Case No. 86-CV-134, naming the Town of Casey and named town board members as defendants. The Wisconsin Public Intervenor, acting pursuant to Wis. Stats. §§ 165.07 and 165.075, was admitted by the court on motion and without objection as a party defendant.

By amended motion dated December 1, 1986, plaintiffs moved for summary judgment alleging the town's ordinance was invalid on the grounds it was pre-empted by federal and

state law. No other grounds were alleged or briefed. The reasonableness of the ordinance, or any of its parts, was not contested in the motion.

The Washburn Circuit Court granted plaintiffs' motion and declared void the town's ordinance, and impliedly all others like it, as pre-empted by both state and federal laws (II App. B).

The order, supported by findings of fact and conclusions of law by the Washburn County Circuit Court, enjoined the Town of Casey and town officials from enforcing Ordinance 85-1. The grounds in support of the order were that: the ordinance was pre-empted by federal law through FIFRA, 7 U.S.C. § 136-136y (1980); Congress intended to pre-empt the regulation of pesticides by local governments; local pesticide regulation is pre-empted by state law; and the ordinance conflicts with federal and state laws and regulations.

Appeal was made to the Wisconsin Court of Appeals. The Wisconsin Supreme Court accepted the case on bypass of the court of appeals pursuant to the joint petition of all parties. Mortier, 154 Wis. 2d at 20 n.2, 452 N.W. 2d at 555 n.2. A divided Wisconsin Supreme Court affirmed the order of the Washburn County Circuit Court exclusively on the federal pre-emption question. Id.

REASONS FOR GRANTING THE WRIT

I. THE WISCONSIN SUPREME COURT'S DECISION ON THE FEDERAL QUESTION CONFLICTS WITH OTHER STATE AND FEDERAL COURT DECISIONS, AND SHOULD BE SETTLED BY THIS COURT.

The present case meets the Supreme Court Rule 10 criteria for review on writ of certiorari. The Wisconsin Supreme Court decision on the federal pre-emption question presented here conflicts with the state court of last resort decisions in People ex rel. Deukmejian v. County of Mendocino, 36

Cal. 3d 476, 683 P.2d 1150 (1984), and Central Maine Power Company v. Town of Lebanon, 571 A.2d 1189 (Me. 1990). The Maine and California decisions are in conflict with the Wisconsin Supreme Court decision and the federal court decision in Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109 (D. Md. 1986), aff'd without opinion, 822 F.2d 55 (4th Cir. 1987). Two other federal district court decisions on the same federal issue are in conflict and are on appeal in the federal circuit courts: COPARR Ltd., et al. v. City of Boulder, No. 87-M-1865 (D. Col. Oct. 3, 1989) (II App. D), appeal docketed, No. 89-1341 (10th Cir., Nov. 1, 1989); Professional Lawn Care Ass'n v. Village of Milford, No. 89-1439 (E.D. Mich., Aug. 24, 1989) (II App. E), appeal filed No. 89-2141 (6th Cir. to be argued June 14, 1990). No matter the outcome of these cases, there will remain conflict in the case law at least between

state courts and state and federal courts on the federal issue. The federal issue will not be settled until this Court does it.

II. SUPREMACY CLAUSE JURISPRUDENCE IS IN NEED OF A WORKABLE RULE OF STATUTORY CONSTRUCTION TO DISCERN CLEAR CONGRESSIONAL INTENT TO PRE-EMPT STATE DELEGATION OF AUTHORITY TO LOCAL GOVERNMENTS.

A. The Wisconsin Supreme Court Did Not Properly Apply The Governing Rule That The Congressional Intent To Pre-empt The States Or Local Governments Must Be "Clear and Manifest."

"[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 713.

The fundamental rule in pre-emption cases is "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v.

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). This rule did not work in this case.

The Wisconsin Supreme Court majority found that the words in the federal act are unclear on the issue of local pre-emption. Mortier, 154 Wis. 2d at 25, 452 N.W.2d at 557-58. It also recognized that the Congress fervently debated but failed to expressly pre-empt local governments from regulating pesticides. Id. at 25-28, 452 N.W.2d at 558-59. See also id. at 39-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting). Yet, as did the Maryland federal district court, the Wisconsin court still managed to derive a "clear" intent to pre-empt from a faulty pre-emption analysis,[1] and from statutory language and

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[1]The Wisconsin court cites at 154 Wis. 2d at 31-32, 452 N.W.2d at 560-61, in support of its holding the following passage from Maryland Pest Control, 646 F. Supp. at 113:

(continued...)

legislative history on which numerous courts and justices differ.

In the face of express permission of the Congress to the states to regulate pesticide use, the Wisconsin court resorted to statutory language and legislative

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[1](...continued)

> Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between the two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized local pesticide regulation.

(Emphasis added). The clear error in this analytical approach is that the issue in federal pre-emption cases is not, as the district and Wisconsin court couched it, whether "the legislation as finally enacted did not include the proposed language . . . which would have authorized local pesticide regulation." Absent clear pre-emption, local governments were already authorized to regulate in the field. The rule not applied by these courts remains whether the intent to pre-empt authority already possessed by states and local governments clearly was pre-empted. Hillsborough, 471 U.S. at 715.

history to derive inferences of intent to pre-empt local governments.[2]

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[2]Statutory language in the federal act and legislative history equally support opposite inferences that Congress did not intend to pre-empt local governments from regulating pesticides.

> 7 U.S.C. sec. 136v(b) contains an express preemption provision which prohibits states from enacting labeling laws. It is obvious from this subsection that where the full Congress desired preemption, the law expressly provided for it. Although sub. (b) only expressly prohibits states from dealing with labeling, it impliedly includes preemption of local governmental units in this area also. Any other interpretation would create an absurd result. . . .
>
> Congressional intent to allow local governments to take action in this area is also fairly implied from the express language of FIFRA sec. 22(b) [7 U.S.C. sec. 136t (b)]. This section instructs the EPA administrator to cooperate with any agency of any political subdivision, i.e. city, village town, of a state to secure uniformity of regulations. These instructions would be meaningless if local governments were not perceived as having the authority to adopt regulations in the first

(continued...)

An important fact discounted by the Wisconsin majority was that congressional committees and legislators confronted head-on the policy question whether local governments should be pre-empted from regulating pesticides. In the end, the pre-emption proponents failed to obtain an express provision or other amendatory language in the law to clearly limit or qualify the authority possessed by municipalities to act in the field. See Mortier, 154 Wis. 2d a 41-44, 452 N.W.2d at 564-66 (Abrahamson, J., dissenting), 154 Wis. 2d at 49, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

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[2](...continued)
instance. Obviously, the full Congress contemplated there would be the authority in local governments to adopt pesticide laws for which the goal of cooperative uniformity would be sought.

Mortier, 154 Wis. 2d at 48-49, 452 N.W.2d at 568 (Steinmetz, J., dissenting) (footnotes omitted). See also People ex rel. Deukmejian v. Mendocino County, 683 P.2d at 1158-1161.

Instead, the court relied heavily on separate Congressional committee interpretations of bills that preceded the Conference Committee version ultimately adopted by the full Congress that admittedly "did not consider the issue of local regulation of pesticides." Mortier, 154 Wis. 2d at 559, 452 N.W.2d at 559. "Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring). "Although individual committee recommendations may be persuasive, they do not dictate what the intent of the law is when it is adopted by the full Congress. That Congress debated the issue at great length without providing clear indications of preemption leads to the conclusion that no federal preemption was intended."

Mortier, 154 Wis. 2d at 49, 452 N.W.2d at 568 (Steinmetz, J., dissenting).

Especially where the rights of the states to delegate to their local governments the authority to exercise the police power to protect citizen safety is at stake, a judicial rule defining what is required to meet the "clear and manifest purpose" test is needed.

There is a need for an explicit ruling from this Court akin to the implied holding in the California and Maine Supreme Court cases and the dissents in the Wisconsin case to the effect that where the Congress expressly grants authority to the states to act in a given field, where Congress clearly addresses and debates the issue of whether it should pre-empt the states or local governments from regulating in a given field, and where the Congress then proceeds to enact a law without expressly pre-empting them, pre-emption should not be implied from

an inconclusive legislative history. In such cases, pre-emption is not the "clear and manifest purpose of the Congress." Such a rule of statutory interpretation would be "consistent with the historical view of state sovereignty and the state's freedom to distribute regulatory power between itself and its political subdivisions," COPARR, slip op. at 5 (II App. D at 13); People ex rel. Deukmejian v. Mendocino County, 683 P.2d at 1161; would bring some much needed clarity to the law, and would help reduce the spectre of litigation in pesticide pre-emption and other pre-emption cases.

B. Under the Supremacy Clause Analysis, Where The Congress Expressly Allows States To Retain Their Authority To Regulate In A Particular Field, The Contrary Intent To Pre-empt The States From Delegating Their Authority Within That Field To Their Local Governments Should Be Equally Clear.

Under the Supremacy Clause analysis, states retain their sovereignty except where

a federal law expresses to the contrary a "clear and manifest purpose of Congress," Rice v. Santa Fe Elevator Corp., 331 U.S. at 230; Hillsborough, 471 U.S. at 715. The states' authority includes the prerogative to choose the means by which they exercise that authority. In turn, this includes the right to delegate regulatory authority to local governments. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 575 (1985) (Powell, J., dissenting).

> The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them. E.g., The Federalist No. 17, p107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961).

Garcia at 574 n.18 (Powell, J., dissenting).

The Wisconsin decision, and others like it, infer a congressional intent to reach into the inner workings of the states to overturn state choices to act through their

local governments even where the court admits, "[b]ecause it is not clear that the statutory language alone evinces congress' manifest intent to deprive political subdivisions of authority to regulate pesticides, it [the statute] is ambiguous." Mortier, 154 Wis. 2d at 25, 452 N.W.2d at 557-58. Still, congressional intent to pre-empt local governments from exercising their delegated authority was derived from a muddy legislative history on which no less than four other courts have reached conflicting interpretations. Id. at 39, 452 N.W.2d at 564 (Abrahamson, J., dissenting). As a result, no longer is the question in pre-emption cases whether a federal law clearly pre-empts the states along with their local governments from acting in a field, e.g., see Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. at 712; Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Now it is whether federal laws,

even where they expressly allow the states to act, may be discerned to have actually reached into the states to their local governments to pre-empt the latter without the "clear and manifest purpose of Congress" that is traditionally required. Moreover, the split in decisions developing throughout the country on local pre-emption is sending conflicting messages about "the federal-state balance embodied in the Supremacy Clause jurisprudence" that this Court has sought to resolve. Hillsborough at 717; Garcia.

Where the Congress with one hand expressly permits the states to act in a particular field, the "clear and manifest purpose" test behind Supremacy Clause jurisprudence should require that the intent to take back that authority with the other hand be equally clear. Anything less results in the confusion on the issue that now reigns in the nation's courts.

III. IF LEFT INTACT, THE WISCONSIN SUPREME COURT DECISION FORCES THE ISSUE WHETHER, UNDER FUNDAMENTAL PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT, FIFRA MAY BE INTERPRETED TO PREVENT THE STATES FROM DELEGATING AUTHORITY WITHIN THEIR OWN GOVERNMENTAL STRUCTURES.

The issue addressed by the Wisconsin Supreme Court was whether in FIFRA, the Congress intended to pre-empt local governments from regulating pesticides.

The Wisconsin Supreme Court held that by expressly not pre-empting state regulation of pesticides under FIFRA § 24, 7 U.S.C. § 136v, Congress impliedly denied permission to the states to delegate that authority to their local governments. In so doing, the court presumed that as Congress allowed the states to continue exercising their authority to regulate in the field of pesticide use, Congress at the same time may and did retain control as to how the states may exercise this retained power.

The Wisconsin Supreme Court decision thus gives rise to the constitutional issue whether by specifically pre-empting the states from delegating to their local governments the power to regulate pesticides, Congress has impermissibly intruded into so fundamental a right and function of the states as to violate fundamental principles of federalism embodied in the Tenth Amendment to the United States Constitution.

Although it was the view of four dissenting Justices of this Court in Garcia 469 U.S. at 560, that the Court's "decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause," 469 U.S. at 560 (Powell, J., with whom the Chief Justice, Rehnquist, J., and O'Connor, J., joined, dissenting), even the majority of the Court observed looking beyond that case: "If there are to be limits on the Federal

Government's power to interfere with state functions--as undoubtedly there are--we must look elsewhere to find them." 469 U.S. at 547. The Court may be confronted with the need to find one of those limits where, as in this case, FIFRA cannot be reconciled with the states' right to delegate their police powers to their subdivisions.

Although the Court in Garcia rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional,'" 469 U.S. at 546-47, the functions examined there did not go to the heart of state governmental structure or the states' prerogatives of how to delegate the exercise of power within that structure. This case does. And regardless of the manner or standard by which the Court might revisit this issue within the factual

context of this case, there is no more fundamental function of state government that deserves protection from federal intrusion than assigning duties and delegating police power authority to state subdivisions and local governments. Garcia at 575 (Powell, J., dissenting, discussion accompanying n.18).

As in all the other cases decided and pending on the federal pre-emption question presented here, there is no "intimation that the State of Wisconsin or its political subdivisions lack the police power to enact pesticide regulations." Mortier, 154 Wis. 2d at 21, 452 N.W.2d at 556.

There are many governmental structures and means available to the states to carry out legitimate state policies and objectives, not the least of which is the protection of public safety, health, and the environment from toxic pesticide chemicals. See discussion starting at 37, infra. While

some states may choose to assign state level agencies this task, others may find it more desirable to assign it to their local or regional subdivisions. States may make this choice for various reasons including considerations of costs, existing governmental structures already carrying out similar functions, and political acceptability. No one knows more about these factors than state and local elected or appointed officials. For example, suppose a state were to choose to exercise its retained authority to regulate pesticide use by delegating exclusive authority or duties to counties to carry out state policies, standards or programs. Under the Wisconsin Supreme Court holding, that option no longer appears to be available. Because FIFRA has been interpreted to have pre-empted local governments from regulating pesticides, the states necessarily have been deprived the option of assigning pesticide

regulatory responsibilities to their local governments. This occurs, ironically, under a federal law that expressly allows, as the Wisconsin court held, states to continue regulating pesticides.

The Wisconsin Supreme Court decision brings us perilously close to the fundamental constitutional issue whether the Congress may, consistent with fundamental principles of federalism embodied in the Tenth Amendment, tell the states how they may delegate authority within their own governmental structures. This issue could have been avoided had the Wisconsin Supreme Court abided by "the '"cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided."'" U.S. v. Security Indus. Bank, 459 U.S. 70, 78 (1982); citing Lorrilard v. Pons, 434 U.S.

575, 577 (1978); quoting Crowell v. Benson, 285 U.S. 22, 62 (1932).

The constitutional issue still can and should be avoided by interpreting FIFRA in a manner that is consistent, and not on a collision course, with fundamental principles of federalism.

IV. THE WISCONSIN AND MARYLAND DECISIONS RESULT IN COMPLETELY CONTRARY FEDERAL MESSAGES TO THE STATES AND LOCAL GOVERNMENTS ON PROTECTION OF HUMAN HEALTH AND GROUNDWATER SUPPLIES FROM PESTICIDE CONTAMINATION.

As a result of the Wisconsin and Maryland court decisions pre-empting local governments from regulating pesticide use, states and local governments are getting diametrically opposed messages from Congress and the federal government on protection of groundwater from pesticides. Such inconsistency should have been taken into account and avoided under the judicial rule of statutory construction, consistent with

the Supremacy Clause and Tenth Amendment analyses, that "where two statutes are '"capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) (emphasis added); citing Regional Rail Reorganization Act Cases, 419 U.S. 102, 133-134 (1974); quoting Morton v. Mancari, 417 U.S. 535, 551 (1974).

On the one hand the Wisconsin court decision predictably will be interpreted to mean that under FIFRA local governments may not protect the health, safety and welfare of their citizens from pesticides, even where the object of the regulation is to protect from pesticide contamination groundwater supplies that serve the drinking water, domestic use and environmental needs of affected communities.

On the other, the federal government has sent strong messages to the states and local governments that they, not the federal government, must take the lead role in protecting local groundwater supplies from pesticides. FIFRA itself, although not mentioning groundwater specifically, implies that local governments are authorized to adopt pesticide regulatory laws, such as to protect local ground and drinking water supplies, for which the goal of cooperative uniformity is to be sought. 7 U.S.C. § 136t(b). See n.2 at 23. More specifically, the Safe Drinking Water Act Amendments of 1986 require the states to develop programs "to protect wellhead areas within their jurisdiction from contaminants which may have any adverse effect on the health of persons." 42 U.S.C. § 300h-7(a) (Supp. 1990). The programs are required "to specify the duties of . . . local governmental entities, and public water

supply systems," § 300h-7(a)(1), and must contain, among other things, "implementation of control measures . . . to protect the water supply within wellhead protection areas from such contaminants." § 300h-7(a)(4). Local governments are hardly in a position now to implement zoning or other regulatory control measures to protect groundwater in wellhead protection areas from pesticides under the recent ruling by the Wisconsin Supreme Court.

This is particularly disturbing given the deeply rooted interests of the states and local governments in protecting their citizens' safety, Hillsborough, 471 U.S. at 719; Brown v. Hotel Employees, 468 U.S. 491, 502 (1984), from toxic pesticides.

> Pesticides are chemicals or biological substances used to destroy or control weeds or unwanted plants, insects, fungi, rodents, bacteria, and other pests. Pesticides protect our food crops, non-food crops, ourselves, our homes, our pets and livestock. Pesticides are a mixed blessing: they contribute

> significantly to agricultural productivity and to improved public health through the control of disease-carrying pests, but they can adversely affect people, non-target organisms such as fish and wildlife, and the environment. Because pesticides are designed to kill and control living organisms, exposure to them can be hazardous. Some pesticides exhibit evidence of causing chronic health effects such as cancer or birth defects. Some pesticides persist in the environment over long periods of time and accumulate in the tissues of people, animals, and plants.

Pesticides: EPA's Formidable Task to Assess and Regulate Their Risks, United States General Accounting Office at 10 (April 1986). "Pesticide pollution of ground water has recently become a major issue in the United States." Osteen, C., et al., Agricultural Pesticide Use Trends and Policy Issues, United States Department of Agriculture, Agricultural Economic Report No. 622 at 48 (September 1989). "With over 50 percent of the nation's population relying on ground water for their drinking

water source, we cannot underestimate the seriousness of pesticides occurring in ground water." E.P.A. Office of Pesticide Programs, Pesticides In Ground Water Data Base 1988 Interim Report at 1-7 (December, 1988). "In 1987, the U.S. Environmental Protection Agency documented 19 pesticides occurring in ground water from 24 states attributed to agricultural practices." Ibid (citation omitted).

> Nielsen and Lee estimated that 1,128 counties had potential pesticide contamination of ground water. Approximately 46 million people use ground water that may be contaminated with pesticides. About 18 million people rely on private wells that are more susceptible to contamination than deeper, regulated public wells. Ground water in 1,437 counties, or about 46 percent of counties in the conterminous States, may be contaminated by pesticides or nitrogen fertilizers... The ground water contamination potential is especially acute in regions of the Corn Belt, Lake States, eastern seaboard, and gulf coast... The EPA is proposing plans that emphasize State management of ground water problems. . . .

Osteen, at 48. Indeed, Wisconsin has taken up the invitation by enacting a comprehensive groundwater law, 1983 Wisconsin Act 410, which in sections 19, 20 and 21 amend local police power statutes "to encourage the protection of groundwater resources." "Since it is reasonable to assume municipalities may act to protect groundwater supplies, it would be an anomaly to find that these same municipalities cannot act to also protect their food supplies, homes, work, and recreational areas from pesticide contamination." Mortier, 154 Wis.2d at 53, 452 N.W.2d at 570 (Steinmetz, J., dissenting).

In Ruckelshaus, the Court found it "entirely possible for the Tucker Act and FIFRA to co-exist." 467 U.S. at 1018. Had the Wisconsin Supreme Court followed the rules governing both the traditional statutory interpretation and Supremacy Clause analyses, the wellhead protection

provisions of the Safe Drinking Water Act that encourage state and local governments to protect groundwater supplies from pesticides would not be in potential conflict with FIFRA.

Federal agencies, acting under their congressionally delegated authority, are sending an equally clear message to state and local governments to protect their groundwater supplies from pesticides.

In 1984 the United States Environmental Protection Agency (EPA) Office of Ground-Water Protection published its Ground-Water Protection Strategy. There, EPA identified pesticides as a significant source of groundwater contamination (Strategy at 13, 15). EPA's strategy for protecting groundwater contemplates states and their local governments taking the lead protection role, with the EPA providing technical and financial support. Strategy at 33-52. "EPA believes that the most effective and broadly

acceptable way to strengthen institutional capability to protect (ground) water is to strengthen State programs." Id. at 35. In turn, state programs include a strong local government role.

> Local governments can also play a major role in ground-water protection. They derive their authorities from State environmental statutes or from related, powerful authorities, such as those to protect public health and to control land use. . . .

Strategy at 23 (emphasis added). In its follow-up report specifically dealing with protection of groundwater from pesticides, the EPA more directly enunciated the local role it contemplated as part of the national strategy.

> Since pesticides are a potential source of contamination for public water supply wells and critical aquifer protection areas, EPA anticipates that many State and local governments will seek to develop programs that address this source. . . .
>
> . . . .

> The Agency recognizes that technical information on practices to reduce these risks is needed to help in the design and implementation of programs addressing pesticide contamination at the State and local levels.

EPA Office of Ground-Water Protection, Protecting Ground Water: Pesticides and Agricultural Practices at 3 (1988) (emphasis added).

"[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." Hillsborough, 471 U.S. at 719, citing Rice, 331 U.S. at 230.

The traditionally "powerful authorities" of local governments to protect their citizens from pesticide contaminated ground and drinking water supplies will be largely eviscerated if local governments are pre-empted from regulating pesticides as part of their groundwater protection schemes. More significantly, the messages being received by local governments from the federal government on protecting groundwater

from pesticides is now inconsistent and confused. This absurd result should have been avoided by interpreting FIFRA consistent with the retention of the states' right to delegate pesticide regulatory authority to their local governments.

CONCLUSION

For the foregoing reasons, this Court should grant this petition; issue a writ of certiorari to the Supreme Court of Wisconsin; and it should reverse the decision of the Supreme Court of Wisconsin.

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